Filed 6/6/17 In re A.M. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re A.M., a Person Coming Under the Juvenile Court Law.	H043280 (Santa Clara County Super. Ct. No. 315-JV41264A)
THE PEOPLE, Plaintiff and Respondent, v. A.M., Defendant and Appellant.	ORDER MODIFYING OPINION, NO CHANGE IN JUDGMENT

BY THE COURT:

It is ordered that the opinion filed herein on May 15, 2017, be modified as follows:

On page 7, at the end of the second full paragraph which ends with the words "violated former section 11360, subdivision (a)," insert the following footnote:

"In a petition for rehearing, the minor argues he is entitled to have this court reduce his felony adjudication to an injunction pursuant to section 11357, subdivision (a)(1) because his conduct fell within the meaning of newly amended section 11360, subdivision (a)(1), citing *In re Estrada* (1965) 63 Cal.2d 740. This argument was not raised in either the opening or reply brief, and we decline to consider an issue raised for the first time in a petition for rehearing. (*Akins v. State of California* (1998) 61 Cal.App.4th 1, 38-39, fn. 34.) Section 11361.8 affords the minor a procedure by which he may seek relief in the trial court."

There is no change in judgment. The petition for rehearing is denied.

Dated:_____ _____

Premo, Acting P.J.

_____

Elia, J.

Filed 5/15/17 In re A.M. CA6 (unmodified version)

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A.M. (the minor) appeals the jurisdictional and dispositional orders of the juvenile court in which he was found to have committed the crime of felony transportation and distribution of marijuana (Health & Saf. Code, former § 11360, subd. (a)).[1] The minor was declared a ward of the court and placed on probation in his parents' home. The juvenile court imposed various probation terms and conditions, including certain search conditions.

On appeal, the minor argues there is insufficient evidence to support the court's finding that the minor's offense constituted a felony since no evidence was introduced to show that the marijuana at issue weighed more than 28.5 grams. The minor further challenges two of the probation conditions requiring that he submit "property" under his control to search and seizure as being unconstitutionally vague and overbroad.

[1] Unspecified statutory references are to the Health and Safety Code.

We disagree that there was insufficient evidence to support the finding that the minor violated section 11360, subdivision (a). We further disagree that the search conditions are vague or overbroad. Consequently, we will affirm the jurisdictional and dispositional orders.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The juvenile petition

On May 15, 2015, the Santa Clara County District Attorney filed a petition under Welfare and Institutions Code section 602, alleging that the minor "did sell, furnish, and offer to sell and furnish . . . marijuana" and thus committed the offense of transporting and distributing marijuana, a felony (former § 11360, subd. (a)).

B. Contested jurisdictional hearing and disposition

1. The prosecution's case

a. Rod Martin

Martin, an associate principal at Mount Pleasant High School, testified that, on March 11, 2015, another associate principal, Martha Guerrero, brought him the contents of a student's locker. According to Guerrero, a campus monitor reported to her that he smelled marijuana coming from the locker so they opened the locker. Inside they discovered a safe containing one or two $5 bills, a jar containing a plastic bag of marijuana and a $5 bill, along with a black eyeglass case containing empty small plastic bags. The safe and the plastic bag containing marijuana were admitted into evidence.

Martin determined that the locker in question belonged to a student named Fernando S. and summoned him to the office. Fernando told Martin he planned to sell the marijuana, but that he obtained it from the minor.

Martin then spoke to the minor, who admitted giving the marijuana to Fernando. The minor said he originally got the marijuana from another person, Armando L., who had asked the minor to sell it. However, because the minor "didn't want to be caught selling it on school campus," he gave the marijuana to Fernando to sell.

The minor agreed to let Martin view his cell phone. Martin did so and took photos of text messages the minor exchanged with Fernando discussing the purchase of the marijuana and materials to be used in packaging it for sale. Copies of those photos were admitted into evidence.

Martin testified that, on March 12, 2015, Fernando came to him complaining that the minor had sent him threatening messages regarding the money Fernando owed for the marijuana. Martin again interviewed the minor, who admitted sending the messages to Fernando.

b. Fernando

Fernando testified pursuant to a grant of immunity, and said that he and the minor were friends in March 2015. Fernando admitted that the marijuana in his locker belonged to him and the minor. The minor bought the marijuana from someone for $80, and Fernando contributed $10 to the purchase. Fernando said, "We were going to sell [the marijuana]."

When shown photos of the text messages, Fernando confirmed that they showed messages he exchanged with the minor. In some of those messages, the minor told Fernando he needed to pay for the marijuana that had been confiscated and "people [knew] where [Fernando] lived."

c. San Jose Police Officer David Gonzales

Gonzales interviewed the minor on March 12, 2015. During that interview, the minor admitted sending text messages to Fernando and said that Fernando owed him money. The minor said Armando L. had given him the marijuana to sell, but he did not want to, so he gave it to someone named Juan R., who ultimately gave it to Fernando. The plan was to sell the marijuana for $170. Gonzales opined that the minor and the others intended to package the marijuana into smaller quantities for sale, using the small plastic baggies that were also found in the locker.

2. Defense case

The minor testified in his own behalf. He said he did not recognize the jar from Fernando's locker in which the marijuana was found on March 11, though he had seen a "similar" jar during that same week. The minor said Armando and Juan came to him and asked him to sell the marijuana, but he refused and "gave it back to them."[2] He was not friends with Fernando and did not have his phone number.

The minor denied that any of the phones that were shown in the photos admitted into evidence belonged to him, and he further denied that Martin took photos of his phone. He denied sending Fernando threatening messages or that he tried to get money from him. He further denied being involved in any plan to either purchase marijuana or sell marijuana, and denied ever having admitted to any such actions to Martin. The minor believed that Martin, Gonzales and Fernando were all lying and, for some unknown reason, wanted to "get" him.

3. Jurisdictional order

Following the close of evidence and argument by the parties, the juvenile court sustained the allegation that the minor committed felony transportation and distribution of marijuana (former § 11360, subd. (a)) and set the matter for a disposition hearing on January 7, 2016.

4. Dispositional order

On January 7, 2016, the juvenile court admitted the probation report into evidence and adopted its recommendations. The dispositional order notes that the juvenile court had previously sustained the allegation that the minor committed the offense of felony transportation and distribution of marijuana (former § 11360, subd. (a)) and declared the minor as a ward of the court. The minor was placed on probation in his parents' home.

[2] The minor also testified that Armando subsequently asked him to tell Fernando to get in touch with him (Armando). The minor said he had no idea why Armando wanted to talk to Fernando.

The minor timely appealed.

II. DISCUSSION

On appeal, the minor argues the prosecution failed to prove an essential element of the charged offense to sustain a finding that he committed a felony, rather than a misdemeanor. We disagree.

A. There was sufficient evidence to support the allegation

1. Standard of review and relevant legal principles

In juvenile delinquency proceedings, a challenge to the sufficiency of the evidence is "governed by the same standard applicable to adult criminal cases. (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1328.)" (*In re V.V.* (2011) 51 Cal.4th 1020, 1026.) " 'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.]' (*People v. Davis* (1995) 10 Cal.4th 463, 509.) ' "[O]ur role on appeal is a limited one." [Citation.] Under the substantial evidence rule, we must presume in support of the judgment the existence of every fact that the trier of fact could reasonably have deduced from the evidence. [Citation.] Thus, if the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. [Citation.]' (*People v. Medina* (2009) 46 Cal.4th 913, 925, fn. 2.)" (*Ibid.*)

At the time of the offense and the jurisdictional hearing in 2015, section 11360 provided, as follows: "(a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, . . . or offers to transport, import into this state, sell, furnish, administer, or gives away, or attempts to import into this state or transport any marijuana shall be punished . . . by imprisonment . . . for a period of two, three or four years . . . . [¶] (b) Except as authorized by law, every person who gives away, offers to give away,

transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($100)." (former § 11360, subds. (a), (b).)[3]

2. Analysis

The minor argues the alleged offense must be reduced to a misdemeanor because the People presented no evidence that the marijuana found in Fernando's locker weighed more than 28.5 grams and therefore he could only be found to have violated former section 11360, subdivision (b). The People respond that the evidence supports an "implied finding" that the marijuana in question was of a sufficient quantity, and also that there was a "reasonable inference" regarding the amount given that the minor's counsel "never argued that the marijuana . . . had not been shown to weigh 28.5 grams or more."

All of these arguments miss the mark, because the weight of the marijuana under former section 11360 is not relevant when the marijuana in question is transported, furnished or distributed with the intent that it be *sold*. One could only be found to have committed the misdemeanor offense when one "*gives away*, offers to *give away*, transports, offers to transport, or attempts to transport not more than 28.5 grams of

[3] Effective November 9, 2016, the statute was amended by Proposition 64, in relevant part, as follows: "(a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished as follows: [¶] (1) Persons under the age of 18 years shall be punished in the same manner as provided in paragraph (1) of subdivision (b) of Section 11357. [¶] (2) Persons 18 years of age or over shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment. [¶] . . . [¶] (b) Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a [*sic*] infraction and shall be punished by a fine of not more than one hundred dollars ($100)." (Amendment approved by voters, Prop. 64 § 8.4.)

marijuana." (former § 11360, subd. (b), italics added.) Where one furnishes or transports marijuana for purposes of *sale*, however, it makes no difference how much marijuana is involved. In fact, in drug sales cases, there is no requirement to show that even a usable amount of a drug was sold or offered for sale. (*People v. Diamond* (1970) 10 Cal.App.3d 798, 801.)

In this case, there was evidence presented at the jurisdictional hearing that the minor transported or furnished the marijuana seized from Fernando's locker and that he intended that the marijuana be sold. A nonexclusive listing of the relevant evidence includes: (1) the text messages exchanged between Fernando and the minor; (2) Fernando's testimony that he and the minor intended to sell the marijuana for $170; (3) and Gonzales's opinion testimony that the other contents of the locker, such as a safe and the smaller plastic baggies, demonstrated an intent to repackage the marijuana into smaller quantities for sale.

Based on the above, there was sufficient evidence to support the juvenile court's sustaining the allegation that the minor violated former section 11360, subdivision (a).

B. Probation conditions

The minor claims that two of the probation conditions imposed on him, specifically those requiring that he submit "property . . . owned . . . or under [his] control," are unconstitutionally vague and overbroad. Specifically, he argues that the term "property" is vague, since it "could include almost anything in an individual's control, such as Kindles, video game consoles, iPods, and the codes to cars, home security systems, or financial banking cards." He further contends that, to the extent the term "property" includes cell phones and other electronic devices and that the probation condition requires that he provide access to the information and data stored thereon, it is overbroad. We disagree with these arguments in their entirety.

1. Procedural history

At the dispositional hearing, the juvenile court adopted the probation officer's recommendations and conditions in their entirety. Among the probation conditions imposed were the following: "7. That said minor submit his person, property, residence, or any vehicle owned by said minor or under said minor's control, to search and seizure at any time of the day or night by any peace officer with or without a warrant; [¶] 8. That said minor submit his person, property, residence, or any vehicle owned by said minor or under said minor's control, to search and seizure by school officials while on school campus or during school events."

2. Legal standards

A juvenile court is empowered to impose upon a ward placed on probation "any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) "The juvenile court has wide discretion to select appropriate conditions and may impose ' "any reasonable condition that is 'fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' " ' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) This discretion is in fact broader with respect to the imposition of probation conditions for juveniles than it is for adult offenders. (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1152; see also *In re Sheena K.*, *supra*, at p. 889 [probation condition that may be unconstitutional for adult offender may be permissible for minor under juvenile court's supervision].)

Both adult offenders and juveniles may challenge a probation condition on the grounds that it is unconstitutionally vague or overly broad. (See *In re Sheena K.*, *supra*, 40 Cal.4th at p. 887.) As we have explained: "Although the two objections are often mentioned in the same breath, they are conceptually quite distinct. A restriction is unconstitutionally vague if it is not ' "sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been

violated." ' [Citations.] A restriction failing this test does not give adequate notice—'fair warning'—of the conduct proscribed. [Citations.] A restriction is unconstitutionally overbroad, on the other hand, if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.*, *supra*, 188 Cal.App.4th at p. 1153; see also *In re Victor L.* (2010) 182 Cal.App.4th 902, 910.)

3. Analysis

It is well settled that " '[p]robation is not a right, but a privilege.' " (*In re York* (1995) 9 Cal.4th 1133, 1150.) Probation conditions authorizing warrantless searches of a probationer's person, property, and vehicle are "routinely imposed." (*In re P.O.* (2016) 246 Cal.App.4th 288, 296.) The search condition is fundamental both to deterring further offenses and to monitoring the probationer's compliance with the terms of probation. (See, e.g., *People v. Olguin* (2008) 45 Cal.4th 375, 380; *People v. Robles* (2000) 23 Cal.4th 789, 795 (*Robles*); *People v. Balestra* (1999) 76 Cal.App.4th 57, 67 (*Balestra*) [noting that "a warrantless search condition is intended to ensure that the subject thereof is obeying the fundamental condition of all grants of probation, that is, the usual requirement (as here) that a probationer 'obey all laws' "].) "By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers." (*Robles*, *supra*, at p. 795.) As such, a probation search condition "is necessarily justified by its rehabilitative purpose" and "it is of no moment whether the underlying offense is reasonably related to theft, narcotics, or firearms." (*Balestra*, *supra*, at p. 67.)

The minor cites no authority for the proposition that the term "property" is vague and our research has disclosed none. Interpreting the term in context, no reasonable person would be unclear as to its meaning. (*In re Ramon M.* (2009) 178 Cal.App.4th 665, 677.)

We also disagree that the term could reasonably be construed to require the minor to provide access to any electronic devices in his possession. It is true that the tangible, physical aspects of electronic devices falls within the definition of the term "property." However, without an express electronic search probation condition, the minor would not be obliged to provide passwords or other access codes to allow for a review of any of the data on that device.[4] The fact that courts have crafted, and imposed, electronic search conditions of probation separate and apart from the standard search conditions[5] indicates an understanding that electronic devices such as smartphones, tablets, etc. (and more importantly, the data accessible on those devices) must be treated as a distinctive class of property. There is no indication in this case that in imposing the standard search conditions, the juvenile court intended to also authorize searches of the minor's electronic data.

In *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, the Ninth Circuit Court of Appeals concluded that a probation condition that permitted warrantless searches of a probationer's " 'person and property, including any residence, premises, container or vehicle under [his] control' " did not permit searches of his cell phone data. (*Id.* at p. 610.) The types of objects listed in the warrantless search condition were "physical

[4] The minor would, however, be required to permit a peace officer or school official to examine any purported electronic device to ensure that it is not merely a cleverly-disguised container and thus subject to search for any physical property hidden inside.

[5] See, e.g., *In re Malik J.* (2015) 240 Cal.App.4th 896; *In re J.E.* (2016) 1 Cal.App.5th 795; *In re Erica R.* (2015) 240 Cal.App.4th 907, 910; *In re J.B.* (2015) 242 Cal.App.4th 749, 752.

objects that can be possessed," as opposed to cell phone data. (*Id*. at p. 611.) As a result, evidence obtained from a warrantless search of the defendant's cell phone was inadmissible and should have been suppressed. (*Id*. at pp. 607, 614.)

Giving the search conditions imposed here their reasonable and practical construction, we conclude they extend only to tangible property, and not to electronic data. As so construed, the conditions are not unconstitutionally vague. (*People v. Hall* (2017) 2 Cal.5th 494, 501.)

III. DISPOSITION

The jurisdictional and dispositional orders are affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.